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In the Supreme Court of the United States

OCTOBER TERM, 1992

ESSEX ELECTRO ENGINEERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
JOAN M. BERNOTT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the definition of "claim" in the Federal Acquisition Regulation, 48 C.F.R. 33.201, is a valid exercise of regulatory authority for purposes of implementing the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 960 F.2d 1576. The opinion of the Claims Court (Pet. App. 33-69) is reported at 22 Cl. Ct. 757.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1992. A petition for rehearing was denied on May 12, 1992. Pet. App. 29-30. The petition for a writ of certiorari was filed on August 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner entered into a contract with the Navy that required petitioner to overhaul and reconfigure 122 mobile electric power plants. Pet. App. 2. During the performance of the contract, the Navy issued three change orders. The Navy has paid all the principal amounts due to petitioner under these change orders. *Ibid.* The only issue is whether, under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, petitioner is entitled to interest calculated from the dates on which petitioner made various submissions to the Navy relating to the change orders.

The CDA provides for "[i]nterest on amounts found due contractors on *claims* * * * from the date the contracting officer receives *the claim* pursuant to section 605(a) of this title from the contractor until payment thereof." 41 U.S.C. 611 (emphasis added). Section 605(a) provides in pertinent part: "All *claims* by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. 605(a) (emphasis added). Thus, the CDA fixes the date on which a written claim is received by the contracting officer as the starting point for calculation of interest.

The CDA does not define the term "claim." That term is defined, however, in the Federal Acquisition Regulation (FAR). The FAR states that "claim"

> * * * means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. * * *

48 C.F.R. 33.201. The FAR further provides, in defining a "claim," that "[a] voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim." *Ibid.*

2. The first change order to petitioner's contract subjected certain listed parts to a 100% replacement requirement. The second change order required petitioner to incorporate "winterization kits" into the mobile power plants. Pet. App. 3, 6. In both instances, the Navy unilaterally modified the contract and asked petitioner to submit a price proposal for making the changes. Petitioner did so, stating that its proposed prices were based upon cost estimates. After negotiations, the parties entered contract amendments that provided for the changes to be made at prices lower than those proposed by petitioner. Petitioner later submitted invoices based on the amounts due under the amendments, and the Navy paid those amounts. *Id.* at 3-4, 6-7, 39-42, 44-47.

Petitioner then submitted written claims for interest on the principal amounts paid under the two change orders. Petitioner sought interest calculated from the dates upon which it had submitted the price proposals to the dates of payment. The contracting officer partially allowed the interest claims; she awarded interest calculated from 20 days after delivery and acceptance of the work to the dates of payment.[1] The Navy has not paid either interest award. Pet. App. 4-8, 42-44, 47.

[1] The contracting officer based the partial interest awards upon the disputes clause of the contract, included pursuant to 48 C.F.R. 33.208, which allows "interest on a contractor's claim on the amount found due and unpaid from (a) the date the contracting officer receives the claim * * *, or (b) the date payment otherwise would be due, if that date is later." Pet. App. 43. The contracting officer first determined that

3. The third change order required petitioner to submit inspection reports and to propose repairs and reconfigurations to the mobile power units "over and above" the work required in the original contract. Pet. App. 8. Petitioner submitted inspection reports and work proposals for each of the units. Approximately the first half of these inspection reports were not characterized by petitioner as claims when they were submitted, but the remaining 27 reports were so characterized. *Id.* at 49-50. Negotiations between the parties led to 14 contract modifications. *Id.* at 51.

Petitioner then submitted a written claim for interest on the principal paid for the "over and above" work. The contracting officer has not decided that claim. Pet. App. 51.[2]

4. The Claims Court granted summary judgment for the government. It held, first, that petitioner had not submitted "claims" within the meaning of the CDA for payment under the change orders. The submission of such claims, the court further held, was necessary to trigger the government's obligation to pay interest under the CDA. Pet. App. 33-69.

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payment was due 20 days after acceptance of the work and then, relying on subsection (b) of 48 C.F.R. 33.208, awarded interest from that date. Pet. App. 53.

[2] Because petitioner's claim sought more than $50,000, the contracting officer was required to decide the claim "within a reasonable time." 41 U.S.C. 605(c)(3). Under 41 U.S.C. 605(c)(5), "[a]ny failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim." Based on these provisions, the parties have treated the contracting officer's failure to decide petitioner's claim for interest on the amount paid under the third change order as a final decision denying that claim.

a. In determining that petitioner had not submitted "claims" for payment due on the change orders, the Claims Court relied on Federal Circuit precedent stating that "a claim must seek payment of a sum certain as to which a dispute exists at the time of submission." Pet. App. 60 (quoting *Dawco Construction, Inc.* v. *United States*, 930 F.2d 872, 878 (Fed. Cir. 1991)). As to the first two change orders, petitioner argued that its price proposals constituted claims. The court rejected that argument, holding that the price proposals were not "claims" because there was no dispute between the parties at the time the proposals were submitted: "Unilateral cost proposals or correspondence suggesting disagreement during negotiations, while they may ultimately lead to a dispute, do not, for purposes of the [CDA], satisfy the clear requirement that the request be in dispute." Pet. App. 60-61 (quoting *Dawco Construction*, 930 F.2d at 878). The court also noted that accepting petitioner's argument as to when interest commenced would result in "a windfall to the contractor" because on the dates of its price proposals, petitioner had not begun the work or made delivery. Pet. App. 56. Similarly, the court held that petitioner's inspection reports and proposals for the "over and above" work under the third change order were not "claims" because they did not concern matters then in dispute between the parties. *Id.* at 66.

b. The Claims Court further held that petitioner's written claims for interest did not entitle it to interest under the CDA. "For those claims to have any validity," the court determined, "there must have been underlying quantum claims that triggered an obligation to pay CDA interest." Pet. App. 58. The court explained that the CDA "creates as a necessary

condition to the award of interest" the existence of "an underlying claim with respect to the principal liability." *Id.* at 67. Because "there were no underlying claims" by petitioner, the court concluded, the "separate claim[s] for interest" were "ineffective." *Id.* at 68, 69.

5. The Federal Circuit affirmed. Pet. App. 1-28. It upheld the Claims Court's holding that "a necessary predicate to entitlement to interest is the submission of a claim." *Id.* at 20. It also agreed with the Claims Court's determination that the cost proposals and inspection reports submitted by petitioner did not constitute "claims" for purposes of the CDA. Unlike the Claims Court, however, the Federal Circuit found "no need to discern whether a dispute exist[ed]" when those documents were submitted, *id.* at 23, because it determined that "they did not seek a sum certain as a matter of right as required by the Federal Acquisition Regulation (FAR) [48 C.F.R. 33.201] which implements the CDA." Pet. App. 1-2; see also *id.* at 22.

Further, the Federal Circuit rejected petitioner's argument that there is no statutory authority for the FAR provision defining "claim" for purposes of the CDA. The court observed that 41 U.S.C. 405(a) authorizes the Administrator of the Office of Federal Procurement Policy to "prescribe Government-wide procurement policies," and that "[b]y its very terms the CDA applies to contracts involving government procurement." Pet. App. 13. The court then determined that the FAR's definition of "claim"—which requires a claim to be in writing and to seek payment of money in a sum certain as a matter of right—is consistent with the CDA and therefore should be sustained under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Pet. App. 14-17. Having found that petitioner's submissions did not satisfy the regulatory requirements for "claim[s]," the court concluded that petitioner was not entitled to any interest on the amounts paid under the change orders.

ARGUMENT

The decision of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, Congress has conferred exclusive jurisdiction upon the Federal Circuit to review all decisions of the Claims Court, 28 U.S.C. 1295(a)(3), and, with one narrow exception, all disputes under the CDA, 41 U.S.C. 607(g),[3] thereby establishing it as the primary tribunal for resolving issues of the kind presented here. Further review is therefore not warranted.

1. As explained, at p. 2, *supra*, the CDA provides for "[i]nterest on amounts found due contractors on claims * * * from the date the contracting officer receives the claim * * * until payment thereof." 41 U.S.C. 611. The FAR provides a definition of "claim" for CDA purposes, which, *inter alia*, requires that the claim seek payment as a matter of right in a sum certain. 48 C.F.R. 33.201. Petitioner does not contend that the price proposals and inspection reports that it submitted regarding the principal amounts due under the change orders satisfied the requirements of the FAR definition. Rather, petitioner argues that this definition is invalid because it is not authorized by the CDA. There is no merit to this argument.

The CDA specifies that "[a]ll claims * * * shall be in writing and shall be submitted to the contracting

[3] The sole exception is that decisions of the Tennessee Valley Authority Board of Contract Appeals are reviewable in district court. 41 U.S.C. 607(g)(2).

officer for a decision." 41 U.S.C. 605(a). Nothing in the CDA, however, suggests that these two requirements were intended as a complete definition of "claim," so that every form of writing submitted to the contracting officer for decision would constitute a "claim." The challenged regulation, FAR 33.201, fills out the definition by adding two further requirements: A claim must seek payment (1) "as a matter of right" and (2) "in a sum certain."

This case presents a paradigm of an agency's properly addressing by regulation a matter upon which the statute is silent or ambiguous. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Even petitioner concedes that there are "many accepted meanings" for "claim." Pet. 20. Both aspects of the FAR's definition of claim are plainly reasonable. The requirement that payment be sought "as a matter of right" distinguishes claims from mere offers or proposals submitted during negotiations, such as the documents petitioner submitted in this case. The requirement that "a sum certain" be sought is a familiar element of a claim in other areas of the law—for example, for administrative tort claims against the government. See 28 C.F.R. 14.2(a) (implementing 28 U.S.C. 2675(b)).

There is no merit to petitioner's argument (Pet. 32-39) that the FAR regulation defining "claim" is invalid because the CDA does not expressly authorize regulations defining its terms and the Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. 401 *et seq.*, pursuant to which the regulation was adopted, does not expressly refer to the CDA. As the Federal Circuit correctly held (Pet. App. 13-14), the OFPP Act provides an ample basis for the regulation by broadly authorizing the Administrator

of the Office of Federal Procurement Policy to "prescribe Government-wide procurement policies" that "shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation." 41 U.S.C. 405(a). The regulation defining "claim" is part of the FAR and thus fully applies to government procurement contracts, which are also governed by the CDA. See 41 U.S.C. 602(a). The regulation defining "claim" is therefore valid, and the Federal Circuit properly held that the price proposals and inspection reports that petitioner submitted were not claims that triggered the obligation to pay interest because those submissions did not seek payment as a matter of right of a sum certain.[4]

2. The alternative ground adopted by the Claims Court also requires the rejection of petitioner's position. As that court correctly held (Pet. App. 60-63), it is well established under federal procurement law that in order for a document seeking payment to be recognized as a claim, there must be a dispute between the parties. In accordance with that principle, FAR 33.201 provides that "[a] voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim." 48 C.F.R. 33.201. The dispute requirement in the regulation prevents mere "[u]nilateral cost proposals," such as those petitioner submitted here, from being treated as claims. *Dawco Construction, Inc.* v. *United States*, 930 F.2d 872, 878 (Fed. Cir. 1991). Were the law otherwise, such preliminary documents would pre-

[4] Contrary to petitioner's argument (Pet. 14-16), the decision below does not conflict with *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972). That decision preceded the adoption of the OFPP Act, the CDA, and FAR 33.201, and it did not address what constitutes a claim.

maturely trigger the full administrative and judicial review procedures for resolving disputed claims. See generally 41 U.S.C. 605-609; 48 C.F.R. 33.201-33.214. The Claims Court correctly concluded that there was no dispute regarding payment when petitioner submitted the documents it later characterized as "claims," and that those documents therefore did not constitute "claims" under the CDA.

3. Finally, petitioner errs in asserting (Pet. 39-65) that the result below is inequitable and deprives it of property without due process. Petitioner argues that the interest payments it seeks are necessary to compensate it for starting work under the change orders while the price for that work was being negotiated. Such compensation, however, is not constitutionally required. It is common for contractors under both private and government contracts to incur the costs of manufacturing an item before being paid by their customers when the item is purchased or accepted under an existing contract. Moreover, petitioner received interim progress payments for its work (Pet. App. 43), which is the appropriate way to address any inequity in this regard.

Indeed, as the Claims Court correctly perceived (Pet. App. 56), petitioner's theory would produce not equity but a windfall in this case. As to the first two change orders, petitioner sought interest calculated from the dates on which it submitted price proposals. Those submissions, however, occurred before petitioner started the work and well before the Navy accepted delivery. As to the third change order, petitioner sought interest from an even earlier date: the date on which it proposed work that the Navy had not yet authorized. Neither equity nor procurement law compelled the payment of interest from those dates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
JOAN M. BERNOTT
Attorneys

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